

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Sections 901(c) & (d); 903(e)(2)a
(7 Del.C. §§901(c) & (d); 903(e)(2)a)

FINAL

Secretary's Order No.: 2013-F-0048

3588 Atlantic Menhaden

Date of Issuance: November 13, 2013

Effective Date of the Amendment: December 11, 2013

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") the following findings, reasons and conclusions are entered as an Order of the Secretary in the above-referenced rulemaking proceeding.

Background and Procedural History

This Order considers proposed regulations to amend 7 **DE Admin. Code** 3500, Tidal Finfish Regulations, to include a new Section 3588: Atlantic Menhaden. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2013-23. The Department published its initial proposed regulation amendments in the September 1, 2013 *Delaware Register of Regulations*. The Department then held a public hearing on September 30, 2013. The public hearing record remained open at that time for public comment through October 15, 2013.

The purpose of the Department's proposed promulgation is to establish regulations consistent with Amendment 2 to the Atlantic States Marine Fisheries Commission's ("ASMFC") Interstate Fishery Management Plan ("IFMP") for Atlantic Menhaden. Specifically, the proposed action seeks to (1) establish Delaware's annual Atlantic Menhaden quota consistent with Amendment 2; (2) establish timely reporting by the fishery; (3) provide for closure of the fishery upon reaching quota; and (4) establish a daily by-catch limit.

The recent population assessment of Atlantic Menhaden (*Brevoortia tyrannus*) showed a decline in population abundance and low recruitment rates. Estimates of fishing mortality show that overfishing is occurring and, in response, the ASMFC adopted Amendment 2 to the IFMP for Atlantic Menhaden. Amendment 2 is designed to minimize the chance of a population decline due to overfishing, reduce the risk of recruitment failure, reduce impacts to species which are ecologically dependent on Atlantic menhaden, and minimize adverse effects on participants in the fishery.

Implementation of Amendment 2 required that states submit implementation plans for approval by the ASMFC's Atlantic Menhaden Management Board. The Board approved Delaware's implementation plan at its May 22, 2013 meeting. The Department's proposed regulatory action will formally adopt the management measures contained in Delaware's Atlantic Menhaden implementation plan.

The proposed amendments were thoroughly vetted by the Department at the public hearing on September 30, 2013. No public comment was received by the Department from the public at any time during the course of this proposed promulgation. It should also be noted that all proper notification and noticing requirements concerning this proposed promulgation were met by the Department. Proper notice of the hearing was provided as required by law.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated October 31, 2013 (Report). The Report recommends certain findings and the adoption of the proposed amendments as attached to the Report as Appendix A.

Findings and Discussion

I find that the proposed amendments are well-supported by the record developed by the Department, and I adopt the Report to the extent it is consistent with this Order. The Department's experts developed the record and drafted the proposed amendments. As previously noted, no public comment was received by the Department from the public at any time during the course of this proposed promulgation.

I find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these amendments. The adoption of this Order will allow Delaware to (1) establish Delaware's annual Atlantic Menhaden quota consistent with Amendment 2; (2) establish timely reporting by the fishery; (3) provide for closure of the fishery upon reaching quota; and (4) establish a daily by-catch limit.

In conclusion, the following findings and conclusions are entered:

1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these proposed

amendments as final;

2.) The Department provided adequate public notice of the proposed amendments, and provided the public with an adequate opportunity to comment on both the initial proposed amendments, as well as the proposed amendments, including at the public hearing held on September 30, 2013;

3.) The Department held a public hearing on September 30, 2013 in order to consider public comment before making any final decision;

4.) The Department's Hearing Officer's Report, including its recommended record and the recommended amendments as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;

5.) The adoption of this Order will allow Delaware to (1) establish Delaware's annual Atlantic Menhaden quota consistent with Amendment 2; (2) establish timely reporting by the fishery; (3) provide for closure of the fishery upon reaching quota; and (4) establish a daily by-catch limit;

6.) The recommended amendments should be adopted as final regulation amendments because Delaware will be able to (1) formally adopt the management measures contained in Delaware's Atlantic Menhaden implementation plan; (2) minimize the chance of a population decline due to overfishing, reduce the risk of recruitment failure, reduce impacts to species which are ecologically dependent on Atlantic menhaden, and minimize adverse effects on participants in the fishery; and lastly, because (3) the amendments are well supported by documents in the record;

7.) The Department shall submit this Order approving the final regulation to the *Delaware Register of Regulations* for publication in its next available issue, and provide such other notice as the law and regulation require and the Department determines is appropriate.

Collin P. O'Mara, Secretary

3588 Atlantic Menhaden

1.0 Atlantic Menhaden Quota

1.1 The annual quota for Atlantic menhaden shall be determined in accordance with the Atlantic States Marine Fisheries Commission's Interstate Fishery Management Plan for Atlantic Menhaden and its subsequent amendments and addenda.

1.2 Any person who has been issued a valid commercial food fishing license may take and reduce to possession Atlantic menhaden during the period beginning at 12:01 AM January 1 and ending when the Department has determined that the annual Atlantic menhaden quota has been landed. The Department shall establish, based on recent fishery performance and landings, a date and time to order the directed fishery closed.

2.0 Atlantic Menhaden Bycatch Allowance

2.1 It is unlawful for any person who has been issued a valid commercial food fishing license to take and reduce to possession more than 6,000 pounds of Atlantic menhaden during any one day once the Department has determined that the Atlantic menhaden fishery is closed.

2.2 It shall be unlawful for any person who has been issued a valid commercial food fishing license or any vessel, regardless of the number of licensed commercial fisherman onboard that vessel, to possess or land more than 6,000 pounds of Atlantic menhaden in any one (1) day once the Department has determined the annual Atlantic menhaden fishery is closed.

3.0 Atlantic Menhaden Reporting Requirements

3.1 It is unlawful for any person who has been issued a valid commercial food fishing license to not accurately and completely report their Atlantic menhaden landings to the Department, via the interactive voice phone reporting system, within 24 hours of landing.

3.2 In addition to the requirement to phone in daily landing reports, it is unlawful for any person who has been issued a valid commercial food fishing license to not accurately and completely compile and file monthly log sheets detailing their daily landings of Atlantic menhaden on forms supplied by the Department. These forms must be submitted by the 10th of the month next ensuing. Failure to submit these monthly reports on a timely basis may be cause for revocation or non-renewal of their commercial food fishing license.

4.0 Atlantic Menhaden Landing Restrictions

It is unlawful for any person who has been issued a valid commercial food fishing license to offload Atlantic menhaden to any other vessel or means of conveyance prior to landing.